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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA .
VERSUS . Criminal Action
 . No. H-15-CR-263
 .
ASHER ABID KHAN, . Houston, Texas
 . November 20, 2019
 . 2:03 p.m.
Defendant. .
.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LYNN N. HUGHES
HEARING

APPEARANCES:

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PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,
TRANSCRIPT PRODUCED FROM COMPUTER-AIDED TRANSCRIPTION

1 COURT REPORTER:

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1 PROCEEDINGS

2 November 20, 2019

3 THE COURT: A smaller audience than I had this
4 morning. I had 2,552 or something new citizens.

02:03:05

5 MS. FERKO: Oh, wow.

6 THE COURT: That's a crowd. I mean, when I was
7 singing, of course, it was a much bigger crowd every morning.

8 All right. What does the Government want to do
9 this afternoon?

02:03:31

10 MS. FERKO: Well, your Honor, based upon your order,
11 we did file a brief on the law affecting the resentencing; and
12 we put it forth in our sentencing recommendation. I know
13 Mr. Adler also filed a brief which I would like to compliment
14 him on. It was a very well written brief. And --

02:03:48

15 THE COURT: He is, like me, smarter than he looks.

16 MS. FERKO: And your Honor, I would say -- I would say
17 there is an issue to address maybe at the end regarding the
18 status of supervision of the Defendant beyond the date of the
19 26th of November.

02:04:07

20 According to BOP, that's a release date, quote,
21 unquote, on your original sentence; but since the appeal
22 occurred and the judgment is vacated on the -- in September,
23 there is no judgment. So, there would be no supervised release.
24 So, the gap -- there's a gap time between --

02:04:26

25 THE COURT: So, he reverts to being a pretrial

1 releasee.

2 MS. FERKO: And I just think we'd want some direction
3 from the Court on that so pretrial kind of takes over.

4 THE COURT: Your house for Christmas?

02:04:40 5 MS. FERKO: So, that will be helpful because I'm just
6 not sure -- I don't think this situation happens often. And I
7 wouldn't want either agencies or, you know, something to go
8 awry.

9 MR. ADLER: We have no objection to Mr. Khan
02:04:57 10 continuing to comply with all the pretrial conditions that were
11 imposed before the -- or that were in effect as of the
12 sentencing last time. We have no problem with that.

13 MS. FERKO: Right.

14 And I think, your Honor, we'd ask for either --
02:05:08 15 either a detention or either -- the same situation where his
16 pretrial to be reimposed on the 26th or before the 26th even.

17 THE COURT: Have we gotten past ankle monitors and
18 stuff?

19 MR. ADLER: He is not on an ankle monitor.
02:05:29 20 Mr. Hopkins from probation told me that, technically, he is
21 still a BOP inmate even though he is here in the courtroom
22 today. But that will end soon; and then, technically, he would
23 have -- I mean, had the other judgment been in place, he would
24 have started his supervised release.

02:05:39 25 But since there is no judgment, he'll just sort

1 of be in the clear. So, that's why we have no opposition to the
2 pretrial conditions being reimposed.

3 THE COURT: Will you do it?

4 THE PROBATION OFFICER: Yes, your Honor. I'll speak
02:05:50 5 to the pretrial officer that was supervising him before.

6 MS. FERKO: Okay.

7 THE COURT: Understand?

8 THE DEFENDANT: (Indicated yes.)

9 THE COURT: He nodded.

02:06:08 10 I have a question about the record.

11 MS. FERKO: Yes, your Honor.

12 THE COURT: It has been said as a deliberate weasely
13 passive construction that he planned to blow up the Galleria.
14 Now, my recollection is --

02:06:28 15 MS. FERKO: No, your Honor.

16 MR. ADLER: That was a different guy.

17 THE COURT: That's a different guy.

18 THE CASE MANAGER: Yes.

19 (Side-bar discussion off the record between the Court and
02:06:40 20 the case manager.)

21 MS. FERKO: Yeah. The problem is we're the same --

22 MR. ADLER: Yeah.

23 MS. FERKO: Right?

24 This is -- yeah. No, your Honor. This is the
02:06:45 25 one -- this is the case Mr. Khan planned to, basically, from

1 Australia --

2 THE COURT: All he did was --

3 MS. FERKO: -- to meet to go, like, with -- into --
4 basically, go from Turkey into, like, either Syria or Iran.

02:07:01 5 THE COURT: Haven't looked at it in awhile.

6 MS. FERKO: Yeah. I understand, your Honor.

7 THE COURT: What do you want to achieve this
8 afternoon?

9 MR. ADLER: Well, Judge, I think the only thing I want
02:07:18 10 to make sure we're all clear on -- and I suspect the Government
11 agrees -- is that this Court still has tremendous discretion in
12 what sentence to impose at the resentencing hearing in a couple
13 of weeks.

14 I think the problem with the Fifth Circuit, since
02:07:32 15 I was there and, I guess, incurred their wrath -- I've been
16 calling it certain magic words that have to be pronounced by
17 this Court to make the sentence acceptable to the Fifth Circuit.
18 I put some of that in the briefing.

19 Frankly, I'd be willing to propose some language.
02:07:50 20 I suppose the Government would not approve of the number that's
21 going to accompany my proposal, but they might approve of the
22 language as far as what this Court is to -- possibly to
23 pronounce so that the Fifth Circuit doesn't come after me again.

24 MS. FERKO: Well, your Honor, I believe the United
02:08:06 25 States and, I think -- and Mr. Adler agree that the terrorism

1 enhancement should be applied. That calculation should -- he
2 should start at a Level 38. We -- I mean, we're not opposed to
3 his -- he pled guilty, acceptance of responsibility, follow
4 those calculations.

02:08:23 5 The final -- I believe the final calculation ends
6 up being beyond the maximum -- statutory maximum of the
7 sentence. So, he's only subject to a maximum of 15 years which
8 is 180 months.

9 The United States was at the first sentencing and
02:08:41 10 still at this sentencing. We are asking for a maximum sentence
11 in this case. I think we lay out in our briefing, both in -- a
12 little bit of the law affecting the resentencing but more so in
13 our response to Defendant's objections that were just recently
14 filed last week, your Honor, what the United States would want
02:08:59 15 and the reasons why that, you know -- the 18-month sentence,
16 your Honor, is, essentially, a 10 percent -- or a 90 percent
17 deviation downward of the sentence that could be imposed for
18 this Defendant. And we just feel that that's -- it's not
19 enough. It's too insignificant.

02:09:17 20 And I understand there's arguments on the other
21 side by Mr. Adler for the reasons for that type of sentence.
22 But what I think, first, is we just have to get through the
23 calculations; and the United States also, your Honor, would tell
24 -- would state, basically, because of the resentencing and the
02:09:31 25 rule of mandate, there were two points that actually were

1 included in the PSR that was filed -- on the updated PSR that
2 the United States and both the defense agree do not apply.

3 So, instead of the 30 -- 40 or whatever it would
4 be, those two points are not in play because the United States
02:09:49 5 did not appeal that portion of the sentencing guideline
6 calculation. So, that's a moot point. We cannot argue that at
7 this time.

8 THE COURT: Mr. Adler.

9 MR. ADLER: Again, having gone through the Fifth
02:10:05 10 Circuit argument, I felt it was apparent from their questioning
11 that they felt the terrorism enhancement should apply; and so, I
12 have not objected to that again. But that doesn't mean this
13 Court can't vary or depart back down to the original sentence or
14 any other sentence the Court deems appropriate.

02:10:21 15 So, even though I haven't objected to that
16 enhancement and that issue will not be before the Court, I don't
17 want the Court to think I'm conceding that I think a 15-year
18 sentence or maximum punishment is appropriate.

19 Mr. Khan completed the sentence of imprisonment
02:10:34 20 that this Court felt was appropriate the first time, and I --

21 THE COURT: I know that. I'm just trying to make sure
22 we got all the things that we -- I don't want this resentencing
23 to go on for four days.

24 MS. FERKO: Right.

02:10:49 25 THE COURT: Send you all off to look at more books and

1 come back and confuse me more.

2 MR. ADLER: Yeah. We -- both sides have filed some
3 law about the resentencing.

4 MS. FERKO: Yes, your Honor.

02:11:04 5 MR. ADLER: I did file some additional materials
6 relating to him being back in school and working. He's
7 participating in a couple of programs to stop young men from
8 joining extremist groups or criminal gangs.

9 I think he just recently was interviewed for a
02:11:19 10 Podcast that's on the Internet now. The *Chronicle* wants to talk
11 to him. He's involved with something with the City of Houston
12 where he was interviewed. I sat in for that interview, and he
13 explained what he thought caused him to get drawn into this and
14 how parents and teachers and community leaders can spot kids who
02:11:36 15 might be going down the same path.

16 So, I filed some materials about that just
17 showing that he's continued to try to do what he had been doing
18 while he was on bond. He still speaks at the University of
19 Houston student union. When kids come by and talk about
02:11:50 20 geopolitical events, he points out that you should not believe
21 propaganda that's on the Internet from some of these groups.

22 THE COURT: How old was he when he started this? I
23 know he was zero when he started.

24 MR. ADLER: Nineteen?

02:12:18 25 THE DEFENDANT: Yes.

1 MR. ADLER: He was 19 years old.

2 THE COURT: It's a very peculiar process.

3 MR. ADLER: I'm sorry, Judge, I couldn't hear you.

4 THE COURT: This particular set of rules and statutes
02:14:23 5 and things is a very peculiar process. Did I read it correctly
6 that somebody with no criminal history gets an automatic
7 criminal history if they fall under the --

8 MS. FERKO: The terrorism enhancement, your Honor.
9 Yes, it is; and that's part of the application.

02:14:55 10 THE COURT: Can you -- we're not going to reiterate.
11 Just explain to me how a criminal history changes based on a
12 crime. It doesn't matter what it -- unless it's a bank robbery
13 on a Tuesday. They may give you --

14 MS. FERKO: So, your Honor, it's been adopted by the
02:15:12 15 United States Sentencing Guidelines as far as the application of
16 a Category VI once that's found that there's evidence that the
17 Defendant's, in this case Khan's, conduct was calculated to
18 influence or affect the conduct of the United States because
19 ISIS terrorist acts were intended to intimidate or coerce the
02:15:35 20 US.

21 Then once that Level Thirty -- or -- what -- the
22 application of the 12 points is applied, the sentencing
23 guidelines, Congress, as far as that's concerned, wrote in that
24 if you're in this section, then your criminal history, no matter
02:15:55 25 what it is, whether it's a II -- a I, a II, a III, a IV, or a V,

1 you will become a VI.

2 THE COURT: Tell me --

3 MS. FERKO: Sure.

4 THE COURT: -- how a crime on Wednesday changes your
02:16:07 5 criminal history on Monday --

6 MS. FERKO: Well, your Honor --

7 THE COURT: -- the preceding Monday.

8 MS. FERKO: You know, I mean, this is -- the charge of
9 which Mr. --

02:16:16 10 THE COURT: Wait, wait, wait.

11 MS. FERKO: Yes.

12 THE COURT: It doesn't matter what the charge is.

13 MS. FERKO: Well, it does. It does -- it has to be --

14 THE COURT: No. But they could -- by the Government's
02:16:27 15 logic, Congress and the Sentencing Commission could say anybody
16 who hunts geese on Wednesday gets a criminal history of IV.

17 Now, that destroys the phrase "criminal history"
18 of any rational meaning, which is not an unusual practice in
19 government.

02:16:54 20 MS. FERKO: Well, your Honor, I mean, I think -- I
21 mean, the basis --

22 THE COURT: And this is academic because --

23 MS. FERKO: Right. I think the basis or the back-end
24 intent of the guidelines initially was to provide some
02:17:05 25 uniformity, conformity; and so, that's why all these numbers and

1 adding it to these levels and categories --

2 THE COURT: It has nothing to do with calling him
3 something -- in fact, my friend Lincoln there --

4 MS. FERKO: Yes, your Honor. I'm familiar with him.

02:17:20 5 THE COURT: You've met him?

6 MS. FERKO: We've never met.

7 THE COURT: I went to school with him. Mr. Lincoln
8 would respond to arguments like that as if -- if you call a
9 goat's tail a leg, how many legs does the goat have? And the
02:17:39 10 answer is four. Calling something a leg when it's a tail is not
11 rational, and rationality would be something in sentencing that
12 the Constitution would think about.

13 MS. FERKO: Well, your Honor, I mean, as far as the
14 criminal history points and how they add up -- and I'd actually
02:18:06 15 defer to Mr. Hopkins to what the -- the maximum amount of points
16 a person can have; but I think that that fight would
17 automatically -- by automatically them sticking them into
18 Category VI, they weren't worried about if you're a victim of a
19 hate crime, add two points to your criminal history or if you --
02:18:22 20 if you did "X," "Y," and "Z," add seven points to the criminal
21 history category.

22 They just said, no, this is a crime that we find
23 horrible -- abominable and you're going to be a Category VI,
24 like, we're going to push you --

02:18:40 25 THE COURT: It's still not history.

1 MS. FERKO: I'm sorry, your Honor?

2 THE COURT: It's still not criminal history. Criminal
3 history applies to non-offense conduct but other offenses the
4 Defendant may have committed. So, you --

02:18:55 5 MS. FERKO: Wait. But I think that they weren't
6 worried if they were a zero, if they were a -- you know, or if
7 the criminal points history added up to a Category III or
8 Category IV. I just felt that -- my understanding, your Honor,
9 is, from the application and the thought processes behind this,
02:19:10 10 they wanted to put that individual who committed that crime of
11 terrorism -- or pled guilty to that crime of terrorism in a
12 Category VI automatically.

13 MR. ADLER: Judge, if I could, I think I fully
14 understand what the Court is saying, that the nature of the
02:19:25 15 current offense doesn't change what happened historically.

16 THE COURT: Right.

17 MR. ADLER: What -- and frankly, I think if the
18 guidelines were drafted properly, they would have said something
19 about the offense level being changed versus the criminal
02:19:37 20 history category because we can't change what's happened
21 historically. That's just simple logic.

22 And that's why I pointed out earlier this
23 afternoon that, if the Court applies the terrorism enhancement
24 but then finds that that is not a rational or appropriate
02:19:51 25 sentence for just about any reason, as long as the Court puts it

1 on the record, then the Court can say, "I'm going to sentence
2 him back in Category I."

3 So, it's -- I agree it's a little bit of a -- it
4 seems an odd dance that we have to do to get through this; but I
02:20:06 5 am concerned about going back to the Fifth Circuit; and the
6 Fifth Circuit saying we're going to move the case to another
7 Court or something.

8 THE COURT: There's only one who wants to do that.

9 Yes, sir.

02:20:20 10 THE PROBATION OFFICER: Your Honor, I was just going
11 to say the other place in the guidelines this occurs is in the
12 case of career offenders and armed-career criminals where they
13 automatically give a Category VI.

14 And my understanding is that it's to determine --
02:20:33 15 or to account for the likelihood of recidivism, not actually
16 their past conduct and their --

17 THE COURT: Don't call it past conduct when it didn't
18 exist.

19 MS. FERKO: Well, I think the term is -- I mean, at
02:20:44 20 least in the newer guidelines, the current book, I mean, it
21 refers to it as criminal history and criminal livelihood. I
22 mean -- so, I don't know "livelihood" means that it's in the
23 future but I mean --

24 MR. ADLER: Livelihood is --

25 MS. FERKO: Right.

1 MR. ADLER: -- if you've made your livelihood -- if
2 you've made your livelihood as a prosecutor --

3 MS. FERKO: Right.

4 MR. ADLER: -- that's historical because --

02:21:03 5 THE COURT: And that's 20 points.

6 MS. FERKO: But your Honor, I mean, as far as what --
7 as far as that enhancement is concerned, it is --

8 THE COURT: Ms. Ferko --

9 MS. FERKO: Yes.

02:21:13 10 THE COURT: -- you've done a very good job of trying
11 to explain something that we simply have to accept --

12 MS. FERKO: Thank you, your Honor.

13 THE COURT: -- at this stage. So, I don't want to
14 wear you out on that.

02:21:29 15 MS. FERKO: Thanks.

16 THE COURT: The answer is it just is. They call stuff
17 interstate commerce which is -- no founder would have considered
18 interstate commerce. And forfeiture because some component of
19 the computer used was made a problem. Isn't that a confession
02:21:57 20 of silliness or accurateness or something? Yes, the related
21 stuff is bad; but we have 50 other substantial alternative
22 jurisdictions.

23 Do you anticipate any further reading materials?

24 MS. FERKO: At this time, no, your Honor. I feel the
02:22:24 25 United States has provided this Court with a substantial

1 briefing on the law that relates to the sentencing.

2 I believe -- as of last week our reply to
3 Mr. Adler's objections to the PSR I feel answers a lot of
4 things. We actually, you know, conceded the two points under
02:22:39 5 the mandate rule. So, I feel that, you know, we would be ready
6 to proceed to sentencing on the 13th; and I think the PSR that's
7 been updated is well written and includes, you know --

8 THE COURT: So, when are you going to New York?

9 MR. ADLER: I believe Tuesday morning, and I come back
02:22:58 10 Saturday.

11 THE COURT: Okay.

12 You saw that?

13 MS. FERKO: Your Honor, I was -- I actually called
14 Mr. Adler -- I'm actually out of the country that date of the
02:23:09 15 initial, so --

16 THE COURT: That's when we'll set it.

17 MS. FERKO: So, I was hoping Mr. Adler was somewhere
18 on Friday other than Texas.

19 THE COURT: Okay. I misremembered what the
02:23:22 20 application said; and so, I granted it but then remonstrated
21 that, no, we moved it to February. I just --

22 MS. FERKO: No. I think --

23 THE CASE MANAGER: It's December 13th.

24 MS. FERKO: December 13th.

02:23:36 25 THE COURT: Everybody's agreed. That's why we have

1 court reporters and wonderful case managers and people to say
2 no. Somehow I had this -- you know, I sign a lot of stuff.

3 MS. FERKO: Yes, sir.

4 THE COURT: Motions for continuance are the most
02:23:52 5 frequently signed document in my career. And I just --

6 MR. ADLER: On this side of the courtroom, that's
7 considered a big victory if you get a motion for continuance
8 granted. Sometimes that's our only victory.

9 THE COURT: Well, sometimes they deserve a continuance
02:24:14 10 when they might not deserve to win.

11 All right. Anything else we can do?

12 MR. ADLER: No. We'll be here on the 13th, Judge.

13 THE COURT: I think I'll be ready.

14 MS. FERKO: Okay. Thank you, your Honor.

02:24:27 15 THE COURT: I've read what you've done so far, and I
16 just wanted to think about it.

17 MR. ADLER: Thank you, Judge.

18 MS. FERKO: Thank you, your Honor.

19 THE COURT: All right. Thank you, counsel.

20 (Proceedings concluded at 2:24 p.m.)

21
22 C E R T I F I C A T E

23 I certify that the foregoing is a correct transcript
24 from the record of proceedings in the above-entitled matter, to
25 the best of my ability.

By: /s/Gayle L. Dye
Gayle L. Dye, CSR, RDR, CRR

12/ 23/ 2019
Date